

FEDERAL COURT

BETWEEN: UNITED AIRLINES, INC.

Plaintiff

AND

JEREMY COOPERSTOCK

Defendant

**RESPONDING WRITTEN REPRESENTATIONS OF UNITED AIRLINES, INC.
(Defendant's Motion for an Order Pursuant to Rules 226, 227 and 235 of the *Federal
Courts Rules*)**

OVERVIEW

1. These written representations are filed in response to Mr. Cooperstock's ("the Defendant") motion for an Order pursuant to Rule 226 of the *Federal Courts Rules* requiring the Plaintiff to update its Affidavit of Documents, an Order pursuant to Rule 227 of the *Federal Courts Rules* requiring Mr. Scott Wilson, the Plaintiff's representative, to re-attend for cross-examination on the contents of his Affidavit of Documents and an Order pursuant to Rule 235 of the *Federal Courts Rules* requiring the Plaintiff's representative to re-attend for examination for discovery to answer questions relevant to abuse of process and in particular, alleged efforts to "shut down" the

Defendant's website.

2. The Plaintiff submits that the Defendant's motion should be dismissed with costs payable to the Plaintiff forthwith, since the motion is frivolous and without merits.

PART I – FACTS

3. United Airlines, Inc. ("United") commenced the within proceeding on November 19, 2012 for, *inter alia* copyright and trade-mark infringement, passing-off and depreciation of the value of the goodwill associated with the trade-marks by the Defendant.

Amended Statement of Claim, Defendant's Motion Record ("Defendant's MR"), Tab 2

4. In the present case, the Plaintiff has made it clear in its Amended Statement of Claim that it is *"not seeking to prevent the Defendant from operating a website where individuals can express their views about the Plaintiff. Rather the Plaintiff is requesting the relief above in order to protect its intellectual property rights and prevent consumer confusion over whether the Plaintiff owns and/or sponsors the Defendant's UNTIED.com website. As set out in paragraphs 19, 21 and 23 below, the Plaintiff approached the Defendant on multiple occasions with a request that the Defendant modifies his website so that it is not confusingly similar to the United website. The Defendant refused to do so. Accordingly, the Plaintiff is left with no reasonable option but seek relief from this Court"*.

Amended Statement of Claim, Defendant's MR, Tab 2

5. Examinations for discovery of the parties took place in August and October 2013.
6. A motion to compel answers was heard in May 2014 and a decision rendered by Prothonotary Morneau, the case management judge in this matter, on July 3, 2014. This Order has not been appealed.

Order dated July 3, 2014, Defendant's MR, Tab 5

7. The Plaintiff must file its Pre-Trial Conference Memorandum and expert affidavits by December 1, 2014.

8. A proceeding was also commenced in Quebec Superior Court by United Airlines, Inc., Jessica Rossman and Jeff Wittig as Plaintiffs against Jeremy Cooperstock to prevent Mr. Cooperstock from posting the individual plaintiffs' names and contact information on untied.com.

**Re-Amended Introductory Motion For the Issuance Of A Permanent Injunction
(Quebec Superior Court Action No. 500-17-074743-124), United Airlines, Inc.'s
Responding Record ("United RR"), Tab 4**

9. Mr. Cooperstock sought to have the Quebec Superior Court proceeding dismissed as a SLAPP-suit (Strategic Lawsuit Against Public Participation). This motion was dismissed by both the Quebec Superior Court and the Quebec Court of Appeal which have noted that the aim of the Quebec Superior Court proceeding is not to shut down the Defendant's website or otherwise "interfere with the Defendant's ability to criticize United Airlines, Inc.".

**Statement of Defence in Quebec Superior Court Action No. 500-17-074743-124 -
paragraphs 50 and 51, Defendant's MR, Tab 6E**

**Answer to Plea filed by United in Quebec Superior Court Action No. 500-17-074743-
124 - paragraphs 36 to 58, United RR, Tab 5**

10. In the course of the Quebec Superior Court action, Mr. Wittig, one of named Plaintiffs, in that proceeding, produced an e-mail in his possession. This production has led to the present motion.

PART II – ISSUES

11. The issues to be determined on this motion are:

- a) Is the document brought forward by the Defendant relevant so as to cause the Plaintiff to update its affidavit of documents under Rule 226 of the *Federal Courts Rules*?
- b) Is the affidavit of documents of the Plaintiff inaccurate or deficient as contemplated by Rule 227 of the *Federal Courts Rules* and is the cross-examination of the deponent warranted?

- c) Should the representative of the Plaintiff or another representative be ordered to re-attend for further discovery pursuant to Rule 235 of the *Federal Courts Rules*?

PART III – SUBMISSIONS

- a) **Is the document brought forward by the Defendant relevant so as to cause the Plaintiff to update its affidavit of documents under Rule 226 of the *Federal Courts Rules*?**

12. The Defendant alleges that the document produced by Mr. Wittig in the Quebec Superior Court proceeding is relevant to the Defendant's defence of abuse of process in the present proceeding. It is incumbent to consider the nature of the defence of abuse of process in order to ascertain if the document in question is relevant. In support of his abuse of process defence, the Defendant relies on the *Levi Strauss* decision. This particular decision was rendered in the context of a motion to strike. In the latter decision and in *Tractor Supply Co. of Texas, LP v. TSC Stores LP* 2009 FC 154, the Court distinguishes between the procedural defence of abuse of process and the tort of abuse of process. The Court states at paragraph 29:

As a procedural defence, abuse of process allows the Court to control the misuse of the judicial system, where, for example, a party commences multiple actions in respect to one dispute. However, the tort of abuse of process applies only where a party has an improper motive and commits an overt act and requests compensation. (emphasis added)

***Tractor Supply Co. of Texas, LP v. TSC Stores LP* 2009 FC 154, United RR, Tab 6**

13. In *Tractor Supply*, two of the elements of the tort of abuse of process are that the Plaintiff have an improper motive and that it requests compensation. In the present case, the Plaintiff does not have an improper motive as it seeks to enforce its intellectual property rights, including its registered trade-marks and copyrights, and does not seek to shut down the defendant's website, as expressly pleaded. In any event, any relief ultimately granted in this proceeding, will be granted by this Court and is not within the control of the Plaintiff. As to the second element of abuse of process, the Plaintiff has represented to this Court that it seeks no monetary compensation from the Defendant, which representation will also form part of its Pre-Trial Conference Memorandum.

14. In *Levi Strauss*, the Court states in respect of the tort of abuse of process as follows:

A review of the authorities shows that the essential element of the tort of abuse of process is that the abuser must have used the legal process for a process other than that which it was designed to serve, in other words for a collateral, extraneous, ulterior, improper or illicit purpose. The gist of the tort is the misuse or perversion of the Court's process and there is no abuse when a litigant employs regular legal process to its proper conclusion, even with bad intentions. (emphasis added)

Levi Strauss, Defendant's MR, Tab 9, pages 190 and 191

15. The Defendant raises the same defence in the Quebec proceeding but in that case, has chosen to call it a SLAPP-suit. He raises the defence, even after having been unsuccessful at both at the Quebec Superior Court and the Quebec Court of Appeal levels, to have the Quebec proceeding dismissed on that ground.

Statement of Defence, Defendant's MR, Tab 6E, pages 153-154, paragraphs 49 to 52

16. It is submitted that the present motion, just like the defence of abuse of process, are made to deflect attention away from the infringing activities of the Defendant and to further delay these proceedings.
17. While an affidavit of documents is to list the relevant documents in the possession or control of each party, the test to apply in determining relevance is whether information obtained may directly or indirectly advance one party's case, or damage that of the other party.

Hayden Manufacturing Co v Canplas Industries Ltd (1998), 83 CPR (3d) 19 (FC), see paragraph 6, United RR, Tab 7

18. It is submitted that the Plaintiff produced all relevant documents in its possession on the issue of the tort of abuse of process.

Plaintiff's Affidavit of Documents, Defendant's MR, Tab 6(A), pages 112, documents 15 to 17

19. The document referred to by the Defendant in the present motion is an e-mail exchange between Jeff Wittig which is a named Plaintiff in the Quebec Superior Court proceeding to another United employee, appending a voice mail received by Jeff Wittig. This document was produced in the Quebec Superior Court action since that action relates to

the Defendant's unauthorized online posting of the individual Plaintiffs' contact information. The document was produced as an example of voice messages received by the Plaintiff, Jeff Wittig, as a result of the Defendant having posted, on its untied.com website, Jeff Wittig's contact information. The e-mail exchange relates to the efforts of the Plaintiff to have the contact information of the individual Plaintiffs removed from the untied.com website. It bears no relevance to the issues of infringement, passing-off and depreciation of goodwill which are the subject-matter of the present proceeding or to any of the defences raised by the Defendant. The defence of abuse of process has as an essential element "that the abuser must have used the legal process for a process other than that which it was designed to serve, in other words for a collateral, extraneous, ulterior, improper or illicit purpose". It is clear that the document referred to by Mr. Cooperstock is not relevant to the present proceeding having regard to the nature of the defence pleaded and its essential elements. As a result, it is submitted that the Plaintiff does not need to update its affidavit of documents under Rule 226.

b) Is the affidavit of documents of the Plaintiff inaccurate or deficient as contemplated by Rule 227 of the *Federal Courts Rules* and is the cross-examination of the deponent warranted?

20. It is further submitted that the Defendant has failed to discharge his burden of proof that the affidavit is deficient in the sense that other documents have not been produced. In paragraphs 19 and 24 of his representations, the Defendant makes the statement that the existence of the e-mail at issue "suggests the existence of other such documents" but offers no support for such a statement. The Court has held in *Havana House* that a party "in pressing for further documents through cross-examination on Affidavits of Documents, must have some persuasive evidence that documents are available, but have not been produced, rather than mere speculation, intuition and guesswork". It is submitted that the Defendant's request for an Order to cross-examine on the affidavit of documents is in the nature of a fishing expedition.

Defendant's Written Representations, Defendant's MR, Tab 7, paragraphs 19 and 24

Havana House Cigar & Tobacco Merchants Ltd. (1998) 80 C.P.R. (3d) 132, Defendant's MR, Tab 14, para. 19, page 258

21. It is submitted that the Defendant has failed to discharge his burden of proof under Rule 227. It is further submitted that the defence of abuse of process itself is devoid of merit and no more than a bald unsupported allegation and that this motion constitutes a last ditch attempt to salvage this defence. After conducting examinations and obtaining document production in two different proceedings and having both the Quebec Superior Court and the Quebec Court of Appeal dismiss the Defendant's motion to strike on that basis of abuse of process, the entirety of the defence of abuse of process now appears to hang on a single memo, which bears no relevance to the present proceeding. It is clear that the defence of abuse of process is an unsupported plea, which fails to meet the requirements of Rule 174 of the *Federal Courts Rules*.

Rule 174 of the *Federal Courts Rules*, United RR, Tab 3

22. Furthermore, it is submitted that the Order of Prothonotary Morneau dated July 3, 2014 is determinative of the present motion. As pointed out by the Defendant in his written representations, during the course of the examination for discovery, the Defendant made a request for minutes and internal correspondence of meetings at which the Plaintiff discussed the untied.com website. This question was refused by Prothonotary Morneau who held it to be in the nature of a fishing expedition. The Order of Prothonotary Morneau was rendered July 3, 2014 and was never appealed by the Defendant. The Defendant is now seeking by this motion to do indirectly what he can no longer do, namely appeal the said Order.

Order of Prothonotary Morneau , Defendant's MR, Tab 5, page 57

c) Should the representative of the Plaintiff or another representative be ordered to re-attend for further discovery pursuant to Rule 235 of the *Federal Courts Rules*?

23. The Defendant further seeks an Order for further examinations for discovery of the Plaintiff's representative "or preferably...a representative of Plaintiff with knowledge of the contents of the e-mail and internal discussions related to Plaintiff's efforts to shut down his website, Untied.com". The jurisprudence is clear that the Court will only do so for "*special reason in an exceptional case*" and will not allow further discovery where there has already been discovery on a given issue. This is in keeping with the principle

that an examination for discovery is not a never ending process.

***Taylor v. Canada* [1992] 1 FC 316, United RR, Tab 8, paras. 21 and 22**

***John Labatt Ltd. v. Molson Breweries* (1996), 69 CPR (3d) 126, United RR, Tab 9**

24. The Defendant was represented for the examination for the discovery stage and his counsel conducted discovery on the issue of abuse of process. Defendant's counsel was at liberty to ask any questions he wanted and chose to focus many of the questions on the issue of why the Plaintiff had not sued other persons and on the nature of a SLAPP-suit.

Affidavit of Mr. Cooperstock, Defendant's MR, Tab 6B, pages 120 to 133

United RR, Affidavit of Carolina Buscio, Tab 2A, questions 226 to 232, 451 to 459, 497 to 502 and 548 to 564

25. It is submitted that, even if the document at issue in this motion was relevant, no further discovery is warranted in view of the fact that there has already been extensive discovery on the issue of abuse of process. Furthermore, Rule 235 of the *Federal Courts Rules* do not provide for the relief sought by the Defendant, namely further examination of a different representative, an order for substitution being available only under Rule 237(3) of the *Rules*.

Rule 237(3) of the *Federal Courts Rules*, United RR, Tab 3

26. The Plaintiff further submits that the conduct of the Defendant and his counsel during the examination for discovery in October 2013 disentitle them to further examination of the Plaintiff's representative, Scott Wilson. The latter was, during the course of his examination, asked a number of highly inappropriate and improper questions relating, amongst other things, to his religious beliefs and practices. It is submitted that these circumstances warrant that the Court refuse the re-attendance of Mr. Wilson who is both the deponent of the Affidavit of Documents and the representative of the Plaintiff.

Affidavit of Carolina Buscio, United RR, Tab 2A, questions 39-42

27. With respect to paragraph 20 of the Defendant's representations, it is submitted that the Plaintiff was not made aware of a deficiency in its affidavit of documents but rather that Plaintiff's counsel in the present proceeding was sent a letter by the Defendant demanding an amended affidavit, without any explanation. Plaintiff's counsel in the present proceeding is not the Plaintiff's counsel in the Quebec Superior Court proceeding and by reason of the implied undertaking rule is not privy to any particulars of the

Quebec Superior Court proceeding, except for what could be gleaned from the public record.

28. In conclusion, it is submitted that the document at issue in the present motion is not relevant to the issues pleaded in the present proceeding, including the defence of abuse of process whose essential element is that the abuser must have used the legal process for a process other than that which it was designed to serve, in other words for a collateral, extraneous, ulterior, improper or illicit purpose. As a result, the Plaintiff need not update its affidavit of documents pursuant to Rule 226 of the *Federal Courts Rules*. The Defendant has failed to discharge his burden under Rule 227 of the *Federal Courts Rules* and has not put forth any persuasive evidence that further documents on the issue are available. Finally, having already taken discovery on the issue of abuse of process, the Defendant is not entitled to further discovery, particularly since the questions he wishes to pursue have been the subject of a motion to compel and have been refused. It is submitted that the present motion is yet another attempt by the Defendant to deflect attention from the actual issues of this case, namely infringement of the Plaintiff's trade-marks and copyrights, passing-off and depreciation of the value of the goodwill associated with the Plaintiff's trade-marks.

PART IV- ORDER SOUGHT

29. The Plaintiff hereby requests an Order:

- (a) Dismissing the Defendant's motion;
- (b) Awarding to the Plaintiff the costs of this motion payable forthwith; and
- (c) Such further or other relief as to this Honourable Court may seem just

All of which is respectfully submitted this 10th day of November, 2014.

Gowling Lafleur Henderson LLP

GOWLING LAFLEUR HENDERSON LLP

1 Place Ville Marie, 37th Floor
Montreal, Quebec, H3B 3P4

Tel: 514-392-9564

Fax: 514-876-9564

Hélène D'Iorio

Solicitors for the Plaintiff

TO : The Administrator
 Federal Court of Canada,
 Montreal, Canada

AND TO: Jeremy Cooperstock
 392 Grosvenor Street
 Westmount, Quebec, H3Z 2M2
 Defendant